No. 5636

United States Circuit Court of Appeals

For The Ninth Circuit

CARRIE GAUNT, as executrix of the estate of RUBY M. GAUNT, deceased, *Appellant,*

—VS.—

VANCE LUMBER COMPANY, a corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

REPLY BRIEF OF APPELLANT

B. S. GROSSCUP,
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REPLY BRIEF OF APPELLANT

This action was brought:

1. To reform a writing signed by one of the parties and accepted by the other by incorporating therein a more complete description of the land intended to be the subject of the contract.

2. To enforce the contract actually entered into by the parties and performed by the appellant.

The District Court denied reformation. The complainant, having been defeated on that preliminary issue, went out of court and has come into this court

on that issue and that issue alone. Matters in support of and defense of enforcement of the contract, when reformed, are not before this court at this time. The sole issue is the right of reformation.

Appellee's brief concedes the fact that it was the intention of the Company to sell and to employ the Broker to sell all the timber land indicated on the plat, Exhibit 2, and all the property, real and personal, constituting the operating plant located on Sections 10, 16 and 17, Township 17 N., Range 5 W. It is said by appellee, page 19, "The omission was intentional and there is no testimony showing a mistake, mutual or otherwise." This statement can mean nothing less than a confession of fraud. Under the guidance of an able lawyer, intimately connected with its affairs, both as legal and business adviser, the Company was taking advantage of the Broker's ignorance of the law to secure her services for nothing. Such unconscionable conduct estops the Company to plead the statute of frauds as a defense. This proposition is supported by all the cases.

> "It is the well settled doctrine that if one of the parties to a contract which is required by the statute of frauds to be in writing, by his own fraudulent practices prevents it from being reduced to writing in compliance with the statute, equity will interfere at the suit of the other party, and will enforce the agreement, although verbal."
>
> 2 Pomeroy's Eq. Jur. (4th Ed.), note to §867, p. 1781.

The cases cited sustain the text.

The cases cited by appellee involving actions at law and actions in equity for specific performance without reformation have no application to a case for reformation.

Cases where the subject matter of the contract actually agreed upon is in substance illegal and void have no application.

Cases where the parties have not actually entered into the contract have no application. These propositions are illustrated by some of the cases cited.

Hedges v. Dixon, 150 U. S. 182.

In this case it is held that where the substance of the contract entered into between the parties is prohibited by statute, the contract is not enforcible in equity, the court saying, on page 192:

> "Where a contract is void at law *for want of power to make it*, a court of equity has no jurisdiction to enforce such contract, or, *in the absence of fraud, accident, or mistake* to so modify it as to make it legal and then enforce it."

Magniac v. Thomson, 15 How. 281.

In this case it is said, at page 302:

> "Equity may be invoked to aid in the completion of a just but imperfect legal title, or to prevent the successful assertion of an unconscientious and incomplete legal advantage; but to abrogate or to assail a perfect and independent legal right, it can have no pretension. In all such instances, equity must follow, or in other words, be subordinate to the law."

It is further said that there is no evidence tending

to impeach the written agreement as a true statement of the facts and intention of the parties.

1 Story's Eq. Jur. §177 is referred to. In this paragraph Mr. Story says:

> "Equity may compel parties to execute their agreements, but it has no authority to make agreements for them or to substitute one for another. If there had been any mistake in the instrument itself, so that it did not contain what the parties had agreed on, that would have formed a very different case; for where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman either as to fact or to law does not fulfill that intention, or violates it, equity will correct the mistake so as to produce a conformity to the instrument."

Brashear v. West, 7 Pet. 607.

In this case it is said, p. 616:

> "To deprive a party of the fruits of a judgment at law, it must be against conscience that he should enjoy them; the party complaining must show that he has more equity than the party in whose favor the law has decided."

There are two diverging lines of decision, in cases involving reformation and specific performance of the contract as reformed, where it is sought by correction of the writing to add to its terms. Professor Pomeroy, in his able chapter on "Mistake", reviews both lines of authority with very extensive notes.

Pomeroy's Eq. Jur. (4th Ed.) §§866-872 (pp. 1772-1798).

The leading case sustaining reformation is *Keisselbrack v. Livingston*, 4 Johns Ch. 144, 148. On the opposite side is *Glass v. Hulbert*, 102 Mass. 24.

Then there is a third line of cases which hold that it is permissible under the statute of frauds in an equity suit for reformation to make definite and certain the subject matter of the contract which, on the face of the writing, is incomplete.

Our attention has not been called to any American case which denies the power of an equity court to make certain that which can be made certain, and when the writing has thus been made certain by a decree of the court, its enforcement is in no sense in conflict with the statute of frauds. The court has not made a contract. It has simply determined what the parties agreed upon, and then put that agreement in legal form as the parties are presumed to have intended.

Where fraud is present, the court will order:

> "The affirmative relief of reformation by which a written instrument is corrected, and perhaps re-executed, when through fraud of the other party, it failed to express the real relations which existed between the two parties."
>
> Pomeroy's Eq. Jur. (4th Ed.) §872, quoted on page 1801.

The power of a court of equity to prevent miscarriage of justice is inherent and superior to any state legislative enactment.

The court is invited to carefully read the extended note to §867 of Pomeroy's Eq. Jur. (4th Ed.), beginning on page 1774 and ending on page 1784,

wherein the learned author comes to the conclusion, both on reason and authority, that the chancery court will not permit the forms of law to be the instrument by means of which one party can cheat another. This power of the equity court transcends all legislation, no matter in what form it may be put. Equity courts from the beginning have been clothed with the power to enforce right and prevent wrong.

Appellee cites no case from the Washington Supreme Court holding that a contract which states the substance of the agreement entered into between the parties cannot be performed so as to require that statement to be made in legal language. The furthest the court has gone is in *Mead v. White*, 53 Wash. 638, where there was an entire lack of an essential element to make a contract. The court held that such essential element did not appear upon the face of the instrument, and that the evidence was conflicting as to the relation of the parties to the instrument. The court held that an important element of the contract could not be shown by parol. In the opinion the court quotes with approval *Allen v. Kitchen*, 100 Pac. 1052, 1057, in which it is said:

> "We are clearly of the opinion that courts of equity have power and jurisdiction to so reform an executory contract that is valid and binding on its face as to relieve it of any statement, declaration, or description that has been inserted therein through deception, fraud, or mutual mistake, *and to make the statements speak the truth as it was intended to insert them in the instrument.*"

In *Cushing v. Monarch Timber Company*, 75 Wash. 678, there was no attempt to reform a contract. The description of the land was simply "my timber." The defense interposed was a demurrer. The court held as a matter of law that the writing on its face was defective. No question of reformation was involved.

None of the other cases cited by appellee involved the question of reformation. All of them were either actions at law or for specific performance.

In closing we call the attention of the court to §910, 2 Pomeroy's Eq. Jur. (4th Ed.). The underlying principle of reformation of an executory contract is: the decree of the court operates personally upon the defendant; it requires the defendant to do what he ought, in good conscience, to do voluntarily, that is, to correct his mistake. In case of fraud he is estopped to claim any of the benefits of his conduct and is required to restore the defrauded party to everything lost by reason of false representations. It is not correct to say that the decree makes valid that which is void.

The decree is the judicial exercise of power by injecting into the contract that which the parties themselves intended should be in the writing. The court in the exercise of its power steps into the breach and requires the doing of that which the parties intended to have done. A party refusing to perform his moral duty is denied any benefits from his wrongful act.

Respectfully submitted,

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